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IN THE

Supreme Court of the United States

October Term, 1973

No. 73 - 998

TOM PARKER and MORRIE PARKER,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California, Judgment Affirming Judgment of the California Court of Appeal Affirming Judgment of the Superior Court of the County of Los Angeles.

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This is a petition of Tom Parker and Morrie Parker for a Writ of Certiorari to review the judgment and order made by the Supreme Court of California on September 26, 1973, affirming the judgment of the Court of Appeal which on July 31, 1973, had affirmed the judgment against Petitioners made and entered on February 16, 1972, by the Superior Court of the County of Los Angeles, after a jury had found Petitioners guilty of having violated California Penal Code Section 288a (oral copulation).

The Supreme Court of California did not file a written opinion. An order denying Petitioners' request for a hearing in that Court is attached hereto as Appen-

dix "A". The opinion of the Court of Appeal affirming the judgment of conviction was not officially reported but a copy of said opinion is attached hereto as Appendix "B".

Jurisdiction.

The Superior Court for the County of Los Angeles had jurisdiction of this cause by virtue of California Penal Code Section 288a.

The California Court of Appeal and the Supreme Court of California had jurisdiction by virtue of California Penal Code Section 288a, California Constitution, Article VI, §12, and California Rules of Court 28, 29.

This Court has jurisdiction under Title 28, United States Code, Section 1257(3) to review the judgment in question.

Statement of the Case.

Petitioners were originally charged with having conspired to commit an act of oral copulation and with having aided and abetted in said act in connection with the production and direction of a motion picture. Petitioners were also charged with having conspired to sell approximately 99 allegedly obscene motion picture films.

Petitioners pleaded not guilty and were tried by a jury in the Supreme Court of the County of Los Angeles. Prior to the commencement of trial, Petitioners filed a Motion to Dismiss the charges alleging that California Penal Code Section 288a was unconstitutional on its face and as construed and applied to them. The motion was denied.

The jury found Petitioners not guilty of conspiring to sell obscene films, concluding that the films, including the one in which the act of oral copulation had taken place, were not obscene. Nevertheless, on February 16, 1972, Petitioners were found guilty by a jury of having violated Penal Code Section 288a.

On July 31, 1973, the California Court of Appeal affirmed the judgments of conviction. On September 26, 1973, the California Supreme Court refused to grant Petitioners' hearing, thereby affirming the judgments of conviction.

Questions Presented.

1. Whether Petitioners have standing to attack the constitutionality of California Penal Code Section 288a on its face.

2. Whether California Penal Code Section 288a is facially unconstitutional.

Statute Involved.

California Penal Code Section 288a provides in pertinent part as follows:

> "Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years or by imprisonment in the county jail not exceeding one year; . . ."

Statement of the Facts.

During the course of an investigation into the production and sale of motion picture films containing explicit sexual acts, an officer of the Los Angeles Police De-

partment was present on a sound stage and observed Petitioner Tom Parker directing a scene in which an act of oral copulation took place. Thereafter, officers executed a search warrant and seized approximately 99 motion pictures including the one which the officer had seen being shot.

Prior to trial, Petitioners sought to have Penal Code Section 288a declared unconstitutional. In support of their motion, they introduced the testimony of some 6 qualified experts, including two Professors of Psychiatry, a Sociologist specializing in sex research, a marriage counselor, a clinical psychologist and an ordained Methodist Minister, all of whom testified that oral copulation is a normal and natural sexual act and that it is engaged in by a majority of the American population. The motion was denied.

During the trial, the jury was shown approximately 8 hours of films all of which contained acts of oral copulation. It was stipulated that the 8 hours of film were representative of all of the films seized. The jury acquitted Petitioners of having conspired to sell obscene films, concluding that the films were not obscene. Petitioners were, however, convicted of having violated Section 288a.

REASONS FOR GRANTING THE WRIT.

A. California Penal Code Section 288a Is Unconstitutional on Its Face Being Violative of the First, Ninth and Fourteenth Amendments to the United States Constitution.

Petitioners are challenging the constitutionality of a state penal statute which on its face provides that all persons who engage in an act of oral copulation, be they husband and wife or consenting single adults, are guilty of a felony. The statute makes no exception for such persons and no judicial construction has sought to limit the statute's application.

In the trial Court Petitioners developed an unimpeached record conclusively demonstrating that acts of oral copulation are a normal and natural part of our culture engaged in by a majority of adults. Thus, the record is clear that there is no rational basis in fact for the flat prohibition against oral copulation.

As a starting point, we would submit that given the zone of marital privacy created by this Court in *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678 (1965), it cannot be held that the prohibition found in Section 288a against oral copulation, can constitutionally be applied to married people in the privacy of their bedroom. Yet the statute in question clearly makes it a crime for all persons to engage in such an act.

In *California v. La Rue,* 93 S.Ct. 390 (1972) Mr. Justice Marshall observed that: "I have serious doubts whether the state may constitutionally assert an interest in regulating any sexual act between consenting adults. Cf. *Griswold v. Connecticut,* 381 U.S. 479 (1965) . . ." Petitioners submit that Mr. Justice Marshall's

doubts are well founded and that the time has come to decide this important issue of personal liberty.

If this Court should now agree that under *Griswold* states may not make it a crime for married couples to engage in acts of oral copulation, then the entire California statute must be found to be constitutionally deficient under the ruling of *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029 (1972). For *Eisenstadt* makes it clear that by virtue of the equal protection clause of the Fourteenth Amendment states may not afford special rights, privilege or immunities to married couples and deny them to single adults.

B. Petitioners Have Standing to Attack the Constitutionality of the Statute on Its Face.

As we have noted above, Section 288a makes no provision for specific application to those who engage in acts of oral copulation in public or during the filming of motion pictures and clearly seeks to punish all persons who engage in oral sex. This Court has previously held that when an activity sought to be proscribed is as fundamental as an adult's right to choice of sex act, and when the statute is as broad as the one challenged at bar, then anyone prosecuted for violating the statute may attack it on its face. In *Eisenstadt v. Baird*, this Court held that one who was convicted of exhibiting contraceptive articles in the course of a *public* lecture on contraception to a group of students at Boston University and for giving a woman a package of vaginal foam at the conclusion of his lecture, had standing to attack an anti-birth control dissemination statute on its face. The government argued that the appellee did not have standing to assert the rights of unmarried persons denied access to contraceptives because he was

neither a single person nor an authorized distributor of contraceptives. Furthermore, it should be noted that the appellee in *Eisenstadt* was not seeking to use contraceptives *privately* but was *publicly* distributing them. Despite these facts, this Court held that the appellant had standing to attack the statute on its face and to raise the rights of unmarried persons. The Court reasoned that clearly appellee had a sufficient interest in challenging the validity of the statute to satisfy the case or controversy requirement of Article III of the Constitution.

The government further argued, as have the People in the Courts below, that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." In denying this contention, this Court held that:

> "The Court of Appeals held that the statute under which Baird was convicted is not a health measure. If that view is correct, we do not see how Baird may be prevented, because he was neither a doctor nor a druggist, from attacking the statute in its alleged discriminatory application to potential distributees. We think, too, that our self-imposed rule against the assertion of third-party rights must be relaxed in this case just as in *Griswold v. Connecticut, supra.*"

The Court concluded by observing that the relationship between Baird and those whose rights he sought to assert was the relationship between "an advocate of the rights of persons to obtain contraceptives and those desirous of doing so." And in a very real sense, Peti-

tioners herein are advocates of the rights of all those consenting adults in California who wish to engage in oral genital sex. Indeed, the pre-trial testimony on Petitioners' Motion to Dismiss clearly demonstrated not only the absolute necessity for some people to engage in oral genital sex, *i.e.* paraplegics and others with spinal cord injuries who are unable to engage in any other type of sex, but also the desirability of films depicting oral sex as a tool of sex education.

Conclusion.

Petitioners are asking this Court to review and declare unconstitutional a statute of the State of California which on its face prohibits adults from engaging in acts of oral copulation, and makes such conduct a felony. The record developed below makes it abundantly clear that there is no rational basis for the statute.

It is appropriate, however, to indicate in conclusion that by this Petition these Petitioners are not seeking to invalidate California's right to make it a public offense to (1) engage in acts of oral copulation in public; (2) force anyone to engage in an act of oral copulation, or (3) engage in an act of oral copulation with a minor. All of these acts are presently prohibited by statute in California and are clearly constitutionally valid. Likewise, pursuant to this Court's opinion in *Miller v. California*, 93 S.Ct. 2607 (1973), California could, if it desires, make it an offense to show an act of oral copulation in film.

However, the statute in question makes no effort to delimit its scope and is meant to apply to all citizens regardless of their status and regardless of where they perform the act. In its present form, unmodified or limited by any judicial opinion from California's highest Court, Penal Code Section 288a unmistakably is violative of the First, Ninth and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

ANTHONY MICHAEL GLASSMAN,
Attorney for Petitioners.

APPENDIX "A".

Order Denying Hearing After Judgment by the Court of Appeal, 2nd District, Division 1, Crim. No. 22547.

In the Supreme Court of the State of California in Bank.

Order Due September 28, 1973.

People v. Parker et al.

Appellants' petition for hearing DENIED.

Burke, Acting *Chief Justice*

I, G. E. BISHEL, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 21st day of Dec. A.D. 1973.

By /s/ [Illegible], Deputy Clerk.

APPENDIX "B".

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

The People of the State of California, Plaintiff and Respondent, v. Tom Parker and Morrie Parker, Defendants and Appellants. No. 2d Crim. 22547 (Sup. Ct. Nos. A-270417; A-274764; A-278592).

Filed July 31, 1973.

APPEAL from judgments of the Superior Court of Los Angeles County. David N. Eagleson, Judge. Affirmed.

Miller, Glassman & Browning Incorporated for Defendants and Appellants.

Evelle J. Younger, Attorney General, Edward A. Hinz, Jr., Chief Assistant Attorney General, William E. James, Assistant Attorney General, Frederick R. Millar, Jr. and William R. Pounders, Deputy Attorneys General, for Plaintiff and Respondent.

A. L. Wirin, Fred Okrand, Laurence R. Sperber, and John D. O'Loughlin of the American Civil Liberties Union of Southern California as Amici Curiae on behalf of Defendants and Appellants.

In consolidated appeals from three judgments of conviction of conspiracy to violate Penal Code section 288a (oral copulation) and several counts of violation of that statute, appellant Tom Parker contends that section 288a is: (1) unconstitutional as a violation of a protected right of privacy; and (2) does not prohibit oral copulation performed in connection with a theatrical performance. In his appeal from a judgment of conviction of one count of conspiracy to violate Penal

Code section 288a and one count of violation of the statute, appellant Morrie Parker joins in the contentions of his coappellant and argues also that his conviction is not supported by substantial evidence. On the authority of *People v. Drolet*, we conclude that Penal Code section 288a is constitutional and applies to conduct performed in connection with a theatrical performance. We conclude also that substantial evidence supports the conviction of appellant Morrie Parker.

Constitutionality and Construction of Penal Code Section 288a

Appellants contend that Penal Code section 288a defining oral copulation as a felony is unconstitutional because it violates the protections of the First and Ninth Amendments to the United States Constitution and denies equal protection of the law. They contend also that the statute must be construed to exclude from its prohibition oral copulation in the course of a theatrical performance because of the rule of *Barrows v. Municipal Court*, 1 Cal.3d 821 [83 Cal. Rptr. 819, 464 P.2d 483].)

Substantially identical contentions have recently been rejected by the Court of Appeal in *People v. Drolet*, 30 Cal.App.3d 207 [105 Cal. Rptr. 824]. The authority of *Drolet* requires that appellants' contentions be rejected here.

Sufficiency of Evidence—Morrie Parker

Appellant Morrie Parker contends that the evidence is insufficient to support his conviction. We recite here only that portion of the record which pertains to Morrie Parker's involvement doing so in the manner which

resolves all conflicts in the evidence in favor of the judgment and which draws all permissible inferences in its support (*People v. Gardner*, 71 Cal.2d 843, 850 [79 Cal. Rptr. 743, 457 P.2d 575].)

On February 2, 1971, Officer William J. Riddle of the Los Angeles Police Department responded by telephone to an advertisement in Daily Variety offering for sale 16 millimeter "adult" films. As requested by a woman to whom he talked Riddle gave a name, telephone number, address, and business references. He asked about the films and was told that they consisted of three movies of "simulated adult action," nine of "advanced adult action," and thirty-seven of "very advanced adult action." Subsequently appellant Tom Parker called for Riddle and left a telephone number where he could be contacted. Riddle returned the call and arranged to meet Tom Parker.

Pursuant to the arrangement Riddle met with Tom Parker on February 27. Parker after exhibiting a portion of a "hard core" film in a viewer offered to sell the advertised films to Riddle for a price of $250,000.00. A further meeting was arranged for March 1 to which Riddle took Officer Dixon and Policewoman Miller whom he introduced as coventurers. A screening of the films was scheduled for March 2. At the screening appellants Morrie and Tom Parker exhibited about 15 films to Officers Dixon and Miller. That evening the two officers were taken to the Cave Theatre to see two of the motion pictures then being publicly exhibited. On March 3 Tom Parker asked Officer Riddle whether he was going to buy the films. Riddle said that he intended to do so but no price was agreed upon.

On March 4 appellant Morrie Parker and his brother Rick Parker who is not a party to these proceedings conveyed Riddle and Dixon to a sound stage at 663 North Berendo Street where a motion picture, "Tony's Erotic Botique" was being made. Tom Parker acted as both cameraman and director. Riddle, Dixon, Tom Parker, Morrie Parker, and Rick Parker left the stage at a break and went to a nearby restaurant to negotiate the sale and purchase of the films. Riddle agreed to purchase 20 of the motion pictures for $110,000.00 of which $10,000.00 was allocated to a 90 day option to purchase 30 additional films for a price of $140,000.00. Morrie Parker participated in the conversations concerning the sale. He stated that he must leave to interview actors and cast the picture. Tom Parker instructed Morrie Parker to "make sure you get Shelley for tomorrow's shooting." Appellant Tom Parker invited Riddle to return to the sound stage at 10 p.m. to observe further filming of "Tony's Erotic Botique."

At Riddle's instruction Officer Joseph F. Ganley conducted a surveillance of the stage at 663 North Berendo. Between 5 and 5:15 on March 4 he saw Morrie Parker drive up in an automobile with Shelley and another woman. The three entered the door of the stage. The two women subsequently performed in "Tony's Erotic Botique." Shelley and probably the other women conveyed to the set by Morrie Parker were observed by Officer Riddle, when he later visited the set, to engage in acts of oral copulation at the direction of Tom Parker.

The jury found Morrie Parker guilty of conspiracy to commit oral copulation and guilty of the substantive count upon which the conspiracy was based. On this

appeal Morrie Parker argues that the convictions are not supported by substantial evidence.

In essence the sufficiency of the evidence to support the convictions of Morrie Parker on both counts of which he was found guilty stands or falls upon the adequacy of evidentiary support for the conspiracy conviction. If that evidence meets the required test then it also supports the conviction of violation of Penal Code section 288a on the theory that Morrie Parker aided and abetted Shelley in the proscribed conduct. We conclude that the evidence is sufficient.

A conspiracy to commit a crime may be established by circumstantial evidence in the nature of acts and conduct in mutually carrying out a criminal purpose. (*People v. Scott*, 244 Cal.App.2d 146, 151 [36 Cal. Rptr. 402].) Here the agreement to violate Penal Code section 288a appears from the context in which the violation occurred. The jury could properly infer from the circumstances that the acts of oral copulation performed by Shelley at Tom Parker's direction were motivated by two purposes, one the production of an "adult" movie, and the other as part of a sales plan to induce purchasers to pay a large sum of money for films. Morrie Parker's participation in the conspiracy was properly inferred from evidence that he assisted in the sales plan, that he, at Tom Parker's instruction, cast Shelley for the part, and that he conveyed Shelley and another woman to the sound stage, the location of the acts of oral copulation. Morrie Parker's knowledge of the nature of the conduct that would be

filmed is further evidenced by his familiarity with the content of the other films offered for sale.

We thus conclude that the evidence before the trial court was of such a character as to justify a reasonable trier of fact in finding Morrie Parker guilty beyond a reasonable doubt of the crimes charged against him. (*People v. Reilly*, 3 Cal.3d 421, 425 [90 Cal. Rptr. 417, 475 P. 2d 649].)

Disposition

The judgments are affirmed.

NOT FOR PUBLICATION

Thompson, *J.*

We concur:

Wood, *P. J.*

Lillie, *J.*